

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW MEXICO**

PHILLIP DURAN,

Plaintiff,

v.

No. CV 08-0962 WPL/RHS

DOMINO'S PIZZA, LLC,

Defendant/Third-Party Plaintiff,

v.

VIVID MARKETING, INC.,

Third-Party Defendant.

**DECISION**

I have considered the evidence presented on February 22 to 25, 2010, together with the Stipulated Facts set out in the Pretrial Order and the Requested Findings of Fact and Conclusions of Law and trial briefs submitted by the parties, and enter the following Findings of Fact and Conclusions of Law to resolve all issues presented by Phillip Duran and Domino's Pizza:

**FINDINGS OF FACT**

1. Phillip Duran has sued Domino's Pizza for injuries that he claims he received on August 20, 2006 while performing as "Fudgems," a product icon for Domino's Pizza's new brownie squares product that was being introduced at a NASCAR race at the Michigan International Speedway (MIS). Domino's Pizza has filed a Third-Party Complaint against Vivid Marketing, which assisted Domino's Pizza with planning and producing the promotional event at the MIS. The parties stipulated that Michigan substantive law and New Mexico procedural law apply to this case. The

parties further stipulated that, if applicable, New Mexico worker's compensation law applies to this case.

2. Duran is a 48-year old man who lives in Albuquerque, New Mexico. He is a person of short stature, approximately 3'3" tall, and his nickname is "Micro Man." Duran went on Social Security Disability at age 12 for physical problems related to dwarfism.

3. Duran did not complete high school or vocational school but taught himself automobile mechanics and welding, and worked part-time as an automobile mechanic, welder and auto detailer before August of 2006. Duran has also performed in the entertainment industry in a variety of roles over the years. In 1985 he worked as a costumed stunt man in a movie titled "Howard the Duck," and in 2001 he performed in the Musical Theatre Southwest production of the Wizard of Oz in Albuquerque. Beginning in 2003 Duran became more active in the entertainment industry, performing in occasional television shows and commercials, in staged dwarf boxing performances, and as the star player on a basketball team comprised of other short-stature players. Although he claims to have earned more money from his efforts, the earnings he reported to the Internal Revenue Service from 2002 to 2006 totaled \$7,009.00.

4. Domino's Pizza is a Michigan Limited Liability Company that owns and operates retail pizza stores and franchises retail pizza stores across the United States.

5. In 2006, Domino's Pizza offered a new dessert product known as "Brownie Squares" for a limited period of time. A national advertising campaign for Brownie Squares was developed which included the development and use of a character called "Fudgems" that was an animated Brownie Square. Domino's Pizza decided to tie the national launch of the Brownie Squares product with the August 2006 NASCAR race at the MIS and make it the focus of an interactive fan area at the race.

6. Vivid Marketing is a specialized company that does interactive event planning and execution. Domino's Pizza contracted with Vivid to develop and execute certain aspects of the MIS promotional event. On August 7, 2006, Domino's Pizza and Vivid executed a Consulting Agreement which outlined the duties, terms and conditions of Vivid's work for Domino's Pizza. Paragraph 13 of the Agreement provides that Vivid is an independent contractor and that Domino's Pizza is not liable for any damages caused by Vivid.

7. One of Vivid's duties was to locate and engage multiple performers of short stature to portray the Fudgems character at the NASCAR event. Vivid contacted Shortdwarf.com, a talent agency that specialized in the placement of so-called "dwarf talent." On August 11, 2006, Vivid entered into a Performance Agreement with Shortdwarf.com regarding the engagement of "dwarf talent" to portray the Fudgems character.

8. Shortdwarf.com contacted a number of talent agencies, and on August 11, 2006 Shortdwarf.com entered into a Performance Agreement with Duran regarding the engagement of Duran to appear for Domino's Pizza and portray the Fudgems character. Paragraph 14 of the Agreement provides that Duran is an independent contractor and assumes any and all responsibilities for workers compensation insurance. On August 14, 2006, Duran provided Shortdwarf.com with a Sole Proprietor Statement reflecting his understanding that, as a sole proprietor, he was not subject to worker's compensation insurance.

9. The other performers who were recruited for the MIS event attended a "casting call" at which they were asked to try on Fudgems costumes of various sizes that were provided by Domino's Pizza. The other performers who attended the casting call were all taller than Duran, and none of the Fudgems costumes fit them.

10. Duran arrived in Michigan on August 17, 2006 and was taken to Domino's Pizza's

World Headquarters in Ann Arbor. He found that the largest of the Fudgems costumes fit him. The costume allowed Duran very little freedom of upper body movement and also allowed very little straight-ahead vision and no peripheral vision.

11. At this meeting, Duran received orientation and training as to the plans for his schedule and activities at the MIS. Duran was told to report to the Domino's Pizza display area the following morning to begin his work; that his work schedule would generally be 20 minutes on and 40 minutes off each hour; that he would be provided a tent in the backstage area where he could remove the costume, rest, and have food and water between performances; that during the hours when the Domino's Pizza display area was open to the public he would be expected to be in costume except when he was in the backstage area; that his performances would occur on a small platform about 6" - 8" high; that because of his limited vision while in costume Domino's Pizza staff members would guide him back and forth between his performance area and his backstage tent and would stay near him while he was performing for his protection and safety.

12. Karen Scott, Marketing Manager for Domino's Pizza, was heavily involved in planning the Brownie Squares event at the MIS. Scott was responsible for coordinating and overseeing all aspects of Domino's Pizza's activities at the event, and was the primary liaison between Domino's Pizza and Vivid.

13. Vivid developed graphic elements for the Domino's Pizza display area and made suggestions as to how the event should be conducted. Domino's Pizza had the right to approve or disapprove Vivid's suggestions, and during the months leading up to the event and at the event itself Domino's Pizza repeatedly exercised its right to control the details of Vivid's work.

14. Duran performed, in costume, as scheduled in the Domino's Pizza display area on Friday, August 18. He appeared on the small platform in approximately 20-minute shifts, and his

performances consisted generally of waving to the crowd, posing for photographs with visitors, and occasionally giving visitors a “high five” hand slap.

15. When walking between his backstage tent and the performance area, Duran was accompanied by one or more Domino’s Pizza employees who acted as safety guides by holding his hand and directing him around or over obstacles. Because of the physical limitations resulting from the Fudgems costume, Duran was entirely dependent upon the persons acting as his safety guides for his safety and protection.

16. Duran was eager to please Domino’s Pizza, and was hopeful that satisfactory performance at the MIS event could lead to future engagements by Domino’s Pizza for other Fudgems events.

17. Duran performed as scheduled in the Domino’s Pizza display area on Saturday, August 19. His performances were generally of the same nature as on the preceding day, and Duran was at all times while he was in costume accompanied by one or more Domino’s Pizza employees who acted as his safety guides.

18. On Sunday morning, August 20 Domino’s Pizza employees Stefan Sysko and Chantele Telegadas were assigned to act as Duran’s safety guides. As on the preceding two days, Duran gave his first performance on the small platform.

19. The largest crowds at MIS were expected for Sunday, the day of the race and when Michael Waltrip, the driver sponsored by Domino’s Pizza, would be present in the event area. Domino’s Pizza decided that Duran’s next performance as Fudgems should occur on the elevated event stage with Michael Waltrip so that Fudgems could be seen by more of the crowd. Certain Domino’s Pizza and Vivid employees or agents met with Duran after his first performance to discuss his appearance on the elevated stage. Duran believed that all the individuals at the meeting were

employees of Domino's Pizza. Duran suggested that he walk up the stairs present at the side of the event stage. The Domino's Pizza and Vivid employees asked Duran if he would agree to be lifted onto the event stage because of a concern that he might stumble and fall down while ascending the stairs in costume.

20. Because Duran was eager to please Domino's Pizza, he agreed to be lifted onto the stage. While in Duran's backstage tent, Stefan Sysko and one other person practiced lifting Duran, who was out of costume, off the ground. After the practice lift, Duran donned his costume and Sysko escorted him from the tent to the side of the stage.

21. At the time for Duran to appear on stage, Sysko, on Duran's left side, and another male who was wearing Domino's Pizza logo clothing, on Duran's right side, grasped Duran's wrists, lifted him off the ground, and swung him onto the event stage. The person who lifted Duran from his right side was an employee of Domino's Pizza. Upon being lifted off the ground and swung onto the event stage, Duran felt an unusual sensation in his right shoulder. Duran performed on the event stage and completed the remainder of his assigned tasks on Sunday, but his pain worsened during the day.

22. Duran had preexisting arthritis in his right shoulder. He had seen Dr. Ryan, his primary care physician, in 2003 and 2004 with right shoulder complaints, and also presented to the Lovelace emergency room in September of 2004 with right shoulder complaints. X-rays taken at that time indicated that Duran had severe or advanced degenerative arthritis in the shoulder. Duran testified that his shoulder symptoms waxed and waned. This statement is supported by testimony from Dr. Sacoman and records from orthopedic surgeon James Drennan, M.D. who saw Duran in September of 2005 and primary care physician Anastasia Karamanides, M.D., who saw Duran on

August 14, 2006. Duran made no complaints about right shoulder problems to Dr. Drennan or Dr. Karamanides.

23. Duran received treatment for his shoulder injury while in Michigan, and upon his return to Albuquerque saw Dr. Stull, an orthopedic surgeon. Dr. Stull diagnosed Duran's injury as a mild separation of the acromio-clavicular joint and recommended conservative treatment. When Dr. Stull left Lovelace Medical Group, Duran's care was transferred to Dr. Sacoman, another orthopedic surgeon.

24. Duran limited his activities somewhat after the MIS event. He took a less active role in Tiny Tykes basketball games played in November and December of 2006, but he participated fully in a Jerry Springer show filmed in February of 2007.

25. Dr. Sacoman initially provided conservative treatment to Duran but his pain continued to worsen. After conducting diagnostic studies, Dr. Sacoman recommended arthroscopic surgery for pain relief. On April 19, 2007, Duran underwent arthroscopic surgery in which Dr. Sacoman repaired a rotator cuff tear and performed other procedures to provide pain relief. This surgery is related to the injury Duran sustained while working at the MIS event on August 20, 2006.

26. Duran made a full recovery from this surgery, and in October of 2007 Dr. Sacoman released Duran to return to full activities.

27. On February 22, 2008 Duran was lifting the hood of his car when he felt a pop and pain in his right shoulder. This was a new injury to Duran's shoulder and is not related to the injury Duran sustained on August 20, 2006. The second surgery that Dr. Sacoman performed for a torn rotator cuff, and a third surgery for a shoulder surface replacement, are not related to Duran's August 20, 2006 injury.

28. The injury that Duran suffered on August 20, 2006 caused physical and emotional pain and suffering, and limited Duran's ability to participate in activities of his life, until October of 2007. The amount of reasonable and necessary medical and related expense related to the August 20, 2006 injury is \$32,743.26. Duran has suffered total damages in the amount of \$95,000.00.

### **CONCLUSIONS OF LAW**

1. The Court has subject matter jurisdiction over this case, and venue is proper in the District of New Mexico. Duran and Vivid consented to personal jurisdiction over them in New Mexico. Domino's Pizza objected to both personal jurisdiction and improper venue in the District of New Mexico, and I denied its Motion to Dismiss on those grounds on December 29, 2008.

2. Domino's Pizza was negligent in requiring Duran to perform in a costume that unreasonably restricted his vision and his physical mobility, in declining his request to use the stairs to ascend to the stage, and in lifting and swinging Duran up to the stage when he was in a physically vulnerable position and unable to reasonably protect himself because of his physical limitations while wearing the Fudgems costume.

3. Domino's Pizza is liable for the negligent acts and omissions of its employees that caused harm to Duran.

4. If any of the persons who participated in causing injury to Duran on August 20, 2006 was an employee, agent or contractor of Vivid, Domino's Pizza is liable for such person's negligent acts and omissions because they were actual agents of Domino's Pizza, which had retained and exercised the right to control the details of Vivid's work, or they were apparent or ostensible agents of Domino's Pizza because Domino's Pizza clothed them with apparent authority to act on its behalf.

5. Duran was not negligent.



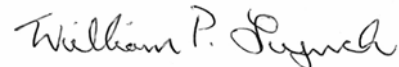
6. Duran is entitled to recover damages from Domino's Pizza for his physical injury, his physical and emotional pain and suffering, his loss of enjoyment of life, for the reasonable expense of necessary medical and related treatment, and for lost wages. These damages total \$95,000.00.

7. Duran was a sole proprietor. He was not legally obligated to obtain worker's compensation insurance and did not fail to mitigate damages.

8. I cannot determine from the evidence submitted whether Duran is entitled to prejudgment interest. If the parties are not able to agree on the resolution of this issue, the parties shall file short trial briefs on this issue by April 29, 2010.

9. Duran is also entitled to recover his taxable costs.

10. All Findings of Fact and Conclusions of Law that are not contained in or consistent with this Decision are refused.



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WILLIAM P. LYNCH  
UNITED STATES MAGISTRATE JUDGE